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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-455

ALFRED RUSSOM, ET AL.,

Petitioners,

vs.

SEARS, ROEBUCK AND CO., A CORPORATION, AND LOCAL 610, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOCAL 688, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

MEMORANDUM ON BEHALF OF SEARS, ROEBUCK AND CO. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent Sears, Roebuck and Co. ("Sears") respectfully prays that this Court deny Petitioners' petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on June 29, 1977.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Petitioners predicate their petition on three premises: *first,* that the courts below "missed the substance" of the action and refused to fashion an equitable remedy; *second,* that the courts below ignored evidence which, Petitioners assert, amounts to a breach by Respondent Local 610, International Brotherhood of Teamsters ("the Union") of its duty of fair representation; and, *third,* that the courts below erred by not requiring Sears to arbitrate with the Union.

Sears submits that the first two points do not merit a reply: the first is entirely specious and finds no support in the record; the second was adequately and correctly disposed of below when the Court of Appeals, after considering *all* of the evidence and acting in accord with *Vaca* v. *Sipes,* 386 U. S. 171 (1967) determined that the Union did not breach its duty of fair representation because its "conduct . . . was not arbitrary, discriminatory or in bad faith." 558 F. 2d 439, 442; Pet. App., p. A17.

Petitioners' third contention, for the reasons discussed below, likewise has no merit.

1. *John Wiley & Sons, Inc.* v. *Livingston,* 376 U. S. 543, 548 (1964), did hold that "in appropriate circumstances . . . the successor employer may be required to arbitrate with the union under the [predecessor's] agreement." *Wiley* also recognized, however, that, as occurred in this case when the Union declined to request arbitration, "a union might abandon its right to arbitration [with the successor] by failing to make its claims known." 376 U. S. at 551. Such "abandonment" will not occur, of course, where there is a breach by a union of its duty of fair representation; however, "[a] breach of the statutory duty of fair representation occurs only where a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca* v. *Sipes,* 386 U. S. at 190.

In order to show arbitrary, discriminatory or bad faith conduct, "[t]here must be substantial evidence of fraud, deceitful action or dishonest conduct." *Motor Coach Employees* v. *Lockridge,* 403 U. S. 274, 299 (1971). Here, there was no evidence of such conduct by the Union. See 558 F. 2d at 442; Pet. App., p. A17.

Only "[t]he union's breach of duty [of fair representation] relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures". *Hines* v. *Anchor Motor Freight, Inc.,* 424 U. S. 557, 567 (1976). The courts below, therefore, properly did not impose any duty to arbitrate on Sears. *Wiley,* does not, as the Petitioners assert, require any different result.

2. Moreover, while in *Wiley* this Court did indicate that in some instances there would be a duty to arbitrate on the part of a non-unionized successor employer, here Sears, the successor, has a union contract with another union covering the type of service work performed by the predecessor's employees. 558 F. 2d at 441; Pet. App., p. A14. Such "presence of another union at [Sears] . . . make[s] the enforcement of the [predecessor's arbitration clause] as against [Sears] unpractical and inequitable," even had arbitration been demanded. *McGuire* v. *Humble Oil & Refining Company,* 355 F. 2d 352, 353 (2d Cir. 1966). The requirement of arbitration would create "an obvious conflict between the interest of the [Sears] employees as a whole and the interests of the [Sears] employees who formerly worked for [the predecessor]" for "it is not unlikely that they would press for an award giving these employees preferential treatment in the matter of seniority, job security, working conditions and other benefits that would adversely effect the other [Sears] employees." *Id.* at 357. In addition, ordering Sears to arbitrate with the predecessor union could also result in the commission of an unfair labor practice by forcing Sears to bargain with a minority union when a majority union is in existence, since the "duty of the employer under

the [National Labor Relations] Act is to bargain collectively with the collective bargaining representative of a majority of the employees in the unit. 29 U. S. C. Section 158(a)(5)". *Id.* at 358.

For all of the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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